No. 48183-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Keith Davis,

Appellant.

Thurston County Superior Court Cause No. 15-1-00526-3

The Honorable Judge Erik D. Price

Appellant's Reply Brief

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ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. DAVIS OF ASSAULT WITH A DEADLY WEAPON.

Mr. Davis rests on the argument set forth in Appellant's Opening Brief.

II. THE DEADLY WEAPON ENHANCEMENT WAS IMPROPER.

A sentence may not be enhanced without a proper jury finding. *State v. Recuenco*, 163 Wn.2d 428, 440-442, 180 P.3d 1276 (2008). In this case, the court erroneously imposed a deadly weapon enhancement in the absence of a proper jury finding.

There is no jury finding that the deadly weapon (a rock) was easily accessible and readily available. *See State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). Nor is there a jury finding of a connection between the defendant, the crime, and the rock.[1] *Id.*

The court did not instruct on either of these elements.[2] CP 82-105. Absent such instruction, the jury cannot be said to have found that the rock

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[1] Such a finding was required for the crime of assault with intent to commit theft of a motor vehicle, the second alternative means charged by the state. More argument on this point is set forth below.

[2] Nor can the court's instructions be read to include these requirements, even when the instructions are "'taken as a whole.'" Brief of Respondent, p. 11 (quoting *In re Reed*, 137 Wn.App. 401, 410, 153 P.3d 890, 894 (2007)).

was easily accessible and readily available, or that there was a nexus between the defendant, the crime, and the rock. Since the jury did not find these facts, the enhancement was improper. *Id.; Recuenco*, 163 Wn.2d at 440.

A. The jury's verdict cannot support the enhancement because jurors did not find facts essential to imposition of the enhancement.

1. Respondent does not address the court's failure to instruct jurors on the requirement that the deadly weapon be easily accessible and readily available.

The trial judge did not include the standard instruction requiring jurors to find that the deadly weapon was "easily accessible and readily available for offensive or defensive use." *See* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.07 (3d Ed).

Respondent does not address this omission. Brief of Respondent, pp. 8-13. This failure may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

The court's failure to instruct on this element requires that the deadly weapon enhancement be vacated. *Recuenco*, 163 Wn.2d at 440-442. The case must be remanded for resentencing without the enhancement. *Id.*

2. The court's instructions did not make the nexus standard manifestly clear.

Jury instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Smith*, 174 Wn.App. 359, 369, 298 P.3d 785, 791 (2013). Instructions relating to a deadly weapon enhancement need not expressly use the word "nexus;" however, the court's instructions must "include[ ] language requiring the jury to find a relationship between the defendant, the weapon, and the crime." *State v. Willis*, 153 Wn.2d 366, 374, 103 P.3d 1213, 1217 (2005).

The standard instruction set explicitly requires the state to prove beyond a reasonable doubt "that there was a connection between the weapon and the defendant... [and] that there was a connection between the weapon and the crime." WPIC 2.07. No such instruction was given here. CP 82-105.

Nor does Respondent contend that the court's instructions made such a requirement manifestly clear in this case. Brief of Respondent, pp. 8-13. Instead, relying on *Eckenrode,* Respondent implies that Mr. Davis waived the error by failing to request an instruction specifically using the word "nexus." Brief of Respondent, pp. 9, 11 (citing *State v. Eckenrode*, 159 Wn.2d 488, 150 P.3d 1116 (2007)).

Ecknerode is inapposite. In *Eckenrode,* the trial court gave "the generally used enhancement instructions," and the Supreme Court held that the "lack of the word 'nexus' [did] not render [them]... per se

inadequate." *Id.*, at 493. This is so because the court's instructions "read as a whole, adequately conveyed the [nexus] requirement." *Id.*, at 492 (citing Court of Appeals decision). Under these circumstances, the court held that failure to request an instruction specifically using the word "nexus" "generally bars relief on review on the ground of instructional error." *Id.*, at 491 (citing *Willis*).

The instructions in this case differed from those in *Eckenrode;* the court here did not employ "the generally used enhancement instructions" used in *Eckenrode. Id.*, at 493. Not only did the court's instructions here fail to explicitly use the word "nexus," they also failed to make manifestly clear the state's obligation to prove a connection between the defendant, the weapon, and the crime. *Cf. Willis,* 153 Wn.2d at 374.

Mr. Davis did not waive any error.

3. The second alternative means of committing count one required proof of nexus.

Respondent erroneously argues that "[t]here was no nexus requirement in Davis's case." Brief of Respondent, p. 10 (citing *State v. Hernandez*, 172 Wn.App. 537, 544, 290 P.3d 1052 (2012)). This is only partly true.

Hernandez and Respondent's argument are premised on actual possession. Once Mr. Davis used the rock to break the car window, he no

longer had actual possession. Indeed, he may not even have known where the rock ended up, given his confused state. RP (9/28/15) 62, 75-76; RP (9/29/15) 140, 159-162, 164, 166, 172, 180.

The problem stems from the state's decision to charge two alternative means of committing count one: assault with a deadly weapon and assault with intent to commit theft of a motor vehicle. Mr. Davis was not in actual possession of the rock during any assault that occurred after he broke the window.

Respondent's argument applies only to the first alternative means, for which the state produced insufficient evidence of the underlying crime. *See* Appellant's Opening Brief, pp. 6-8. The second alternative means—assault with intent to commit theft of a motor vehicle—required the state to prove a connection between Mr. Davis, the rock, and the alleged assault, because Mr. Davis was not in actual possession of the rock.

In the absence of proper instructions, the deadly weapon enhancement was improperly applied to the conviction for assault with intent to commit to commit theft of a motor vehicle. *Recuenco*, 163 Wn.2d at 440-42. The enhancement must be vacated. *Id.*

4. The instructional error requires reversal.

The jury's verdict does not reflect a finding that the deadly weapon was easily accessible and readily available. Nor did the jury find a

connection between Mr. Davis, the weapon, and the crime of assault with intent to commit theft of a motor vehicle.

These errors are not subject to harmless error review. *See State v. Williams-Walker*, 167 Wn.2d 889, 892, 901, 225 P.3d 913 (2010). Accordingly, the deadly weapon enhancement must be vacated and the case remanded for sentencing. *Id.*

B. The evidence was insufficient to prove that Mr. Davis was armed during any assault that took place after he smashed the car window with the rock.

Mr. Davis no longer possessed the rock after he smashed the driver's side window and entered the car. RP (9/28/15) 62, 75-76. Nothing in the record suggests he realized where the rock ended up, or that it remained easily accessible and readily available. Nor did the state prove a nexus between Mr. Davis, the rock, and any assault with intent to commit theft of a motor vehicle.

Accordingly, the evidence was insufficient to prove the enhancement with respect to the second alternative means of committing the crime. The enhancement must be vacated. *State v. Pierce*, 155 Wn.App. 701, 714-715, 230 P.3d 237 (2010).

III. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MR. DAVIS'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR "THE TRUTH."

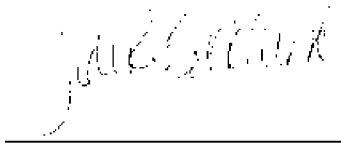
Mr. Davis rests on the argument set forth in his Opening Brief.

CONCLUSION

For the foregoing reasons and those set forth in Appellant's opening Brief, Mr. Davis's convictions must be reversed. In the alternative, the deadly weapon enhancement must be vacated.

Respectfully submitted on May 17, 2016,

BACKLUND AND MISTRY



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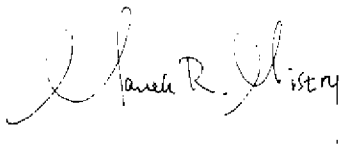

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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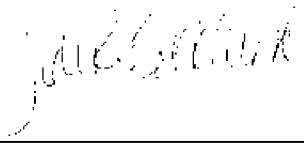
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 17, 2016.



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